ERISA plan itself could be pursued in state court on a breach of contract theory. It is expressly inconsistent with this Court's holding in *Davila, supra.*[1]

Even if the *McDowell* case is not modified on the petition for writ of certiorari, the result in the instant case should eventually be entirely correct. On remand to the district court, the state claims should be dismissed on the merits pursuant to *Davila, supra.* In the alternative, the district court could dismiss for lack of federal jurisdiction. If CHWT then pressed its action for state claims in state court, said action would be properly dismissed under *Davila, supra*, and *Jefferson Pilot Life Insurance Co. v. Krafka*, 50 Cal.App.4th 190 (1996). *Krafka* correctly applied and followed this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, much as this Court did in *Davila, supra.*

Since the decision of the Ninth Circuit is correct except for the fact that the panel's hands were tied by the incorrect *McDowell* decision, and the end result is dictated by *Davila*, there is no compelling reason to grant certiorari in order to correct an erroneous decision. Clarifying the law on constructive trusts could be accomplished more effectively by hearing one of the cases from another circuit misapplying such law.

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[1] The *McDowell* case also has a petition for writ of certiorari pending.

II. REIMBURSEMENT PROVISIONS HIDDEN IN HEALTH INSURANCE PLANS VIOLATE THE WHOLE CONCEPT OF INSURANCE

Reimbursement provisions purport to convert health insurance policies into something akin to a loan obligation. However, the loan obligation is rarely communicated to the insured in any effective form until after the loss occurs. This precludes an insured giving his informed consent to the obligation incurred. Typically, the reimbursement obligation is hidden well back in the contractual documents provided to the insured. In this case, the provision appears at page 26 of the plan but is frequently hidden even deeper in the policy documents. This is particularly troublesome in ERISA cases where the insured is confronted with a bureaucratic tangle of required documents, including the Summary Plan Description, Evidence of Coverage, Summary of Benefits and the ERISA Plan itself.

The Supreme Court of California has recently noted in *Haynes v. Farmers Insurance Exchange*, 32 Cal.4th 1198, 1210-1211 (2004):

> For nearly a hundred years we have recognized that "the rule [presuming parties are familiar with contract terms] should not be strictly applied to insurance policies. It is a matter almost of **common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies**. . ." (*Raulet v. Northwestern etc. Ins. Co.* (1910) 157 Cal. 213, 230 [107 P. 292] [discussing a **lien** provision].)

This is the basis for the common state requirement that all exclusions or exceptions to insurance coverage be "conspicuous, plain and clear." *Haynes, supra*, at 1204. Insurance contracts are subject to special rules of construction because they are contracts of adhesion. *See also Ponder v. Blue Cross*, 145 Cal.App.3d 709 (1983) (exclusion in fine print on page 3 of 3 page policy found inconspicuous). Almost by definition, a reimbursement clause buried at page 26 of an ERISA plan is not conspicuous. As is typical, the Vonderharrs had never heard of it until after the loss. The provision was made known to them only by CHWT's post-accident demand that they sign reimbursement agreements before their brain damaged daughter's medical expenses would be paid.

More importantly, these hidden reimbursement provisions violate the fundamental concept of insurance, which is designed to spread risk. Such provisions accomplish the opposite result by placing all of the risk on the injury victim—frequently the person least able to afford it. Certainly, the injured victim is the person least able to spread the risk. Conversely, the entity most able to bear the risk, and typically in the business of insuring against or spreading risk, bears none of it.[2] Moreover, the risk being reallocated by virtue of the reimbursement provision is very significant to the catastrophic injury victim and very insignificant to the insurance company, union or benefit plan. By way of example, The Rawlings Company, LLC, is probably the largest collection agency in the country attempting to enforce ERISA reimbursement provisions. Rawlings' web site

[2] In the instant case, application of the *Hummell v. Rykoff* [634 F.2d 446, 453 (9th Cir. 1981)] factors showed that CHWT had a net worth of over $80,000,000 while the Vonderharrs were a working carpenter and his family.

(www.rawlingsgroup.com) advertises the following to potential customers: "Recoveries of over 1% of your company's total paid claims can be achieved annually from a single data source when using our full range of recovery services." The possibility of recapturing 1% of total claims[3] paid is an insufficient basis for eliminating the health insurance benefit of catastrophically injured victims who need the insurance benefit the most.

III. IT IS A SIMPLE MATTER FOR ERISA PLANS AND FIDUCIARIES TO PROTECT THEMSELVES FROM RISK WITHOUT REIMBURSEMENT PROVISIONS

Insurance companies and large self-employed plans employ underwriters and actuaries. Group health plans, like CHWT, do the same. It is a function of underwriting to assess and spread risk. Contrary to the assertion by CHWT's counsel, a single loss can not bankrupt a plan, absent underwriting negligence. That is the reason that virtually all insurance plans employ reinsurers.

One of the functions of underwriting is to assess legal decisions affecting risk. Thus, when the Ninth Circuit first held that ERISA did not allow for contractual reimbursement in *PacifiCare v. Martin*, 34 F.3d 834 in 1994, that fact should have been noted by CHWT's underwriters. This prohibition on reimbursement under ERISA has been the subject of at least seven Ninth Circuit cases since then. The Ninth Circuit's

[3] Moreover, since "total paid claims" are far less than premiums collected, due to overhead, administration, profit, etc., it is likely that total reimbursement as a percent of total premiums would be less than one-half of one percent.

position barring reimbursement was affirmed by this Court in *Knudson, supra*, in 2002.

At some point early in this process, this prohibition on reimbursement should have been acted upon by CHWT. Presumably, CHWT's underwriters did take note of this and passed it along to management for inclusion in the next collective bargaining agreement (CBA). It certainly would be legitimate for the union to note the prohibition and the nominal added cost of same and propose an offsetting premium increase of less than one percent. Typically, these CBA's come up for renewal every several years. Having increased the premiums charged the employers through the CBA, CHWT has already been compensated for the inability to seek reimbursement under ERISA, and is seeking a double recovery. If CHWT has not nominally increased its charges though the CBA, it should not be rewarded for its negligent underwriting.

IV. THERE IS NO UNJUST ENRICHMENT TO THE PLAN PARTICIPANT BY DENYING REIMBURSEMENT—ONLY TO THE ERISA PLAN IF ALLOWED

It is worth noting that this Court's holding in *Knudson, supra*, was not a change in the law. Rather, it was an interpretation of what the law has been since its passage in 1974. Petitioner CHWT is attempting to sue for contractual reimbursement, which is expressly disallowed under ERISA. In *Westaff v. Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003), the Ninth Circuit plainly held that reimbursement actions were lawsuits that "Congress, in enacting ERISA, intended to bar." Nevertheless, personal

injury victims like the Vonderharrs are still being sued by their own plans for reimbursement. ERISA plans are still including contractual reimbursement provisions in their documents and filing suits against participants and beneficiaries who stand on their rights, as announced by this Court. Therefore, it is clear that ERISA plans have been unjustly enriching themselves at the public expense for over three decades.

In the context of seeking reimbursement from ERISA insureds, reimbursement and subrogation provisions are generally considered interchangeable terms. *See Reynolds Metals v. Ellis*, 202 F.3d 1246, 1247 (9th Cir. 2000). In *Subrogation: A Pandora's Box Awaiting Closure*, 41 S. Dakota L. Rev. 237, 242 (1996), Professor Roger Baron discusses the insurance industry's claim of unjust enrichment to the insured as the rationale for reimbursement/subrogation:

> For the most part, this rationale is flawed. The "double recovery" argument has been proved to be duplicitous. In most cases, there would not be any "double recovery" for the insured if subrogation is denied. Rather, the great irony is that in the vast majority of cases, the insurer who asserts that the insured will receive an unwarranted "double recovery" is itself picking up a windfall recovery if subrogation is permitted.

On the other hand, personal injury victims, like the Vonderharrs, are not being unjustly enriched. As noted above, insureds are rarely aware of reimbursement provisions until they have been subjected to one. In stating the rationale

behind the collateral source rule, the California Supreme Court has recognized that a personal injury victim "rarely receives full compensation for his injuries .. ." *Helfend v. Superior Court*, 2 Cal.3d 1, 12 (1970).

Additionally, CHWT's entire claim ignores the concept of the "make-whole" doctrine, despite the fact that in footnote 1, CHWT purports to apply it: "CHWT retains—when it did not have to—the common law 'make whole' rule . . ." This is a remarkable admission because the make whole doctrine would eliminate CHWT's claim entirely. Moreover, the statement overlooks the fact that the make whole doctrine is not only the majority rule but has also been adopted by the Ninth Circuit in ERISA cases in *Barnes v. Independent Auto. Dealers Assn. of Cal. H&B Plan*, 64 F.3d 1389 (1995). In *Barnes*, the court held:

> It is a general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.
>
> . . .
>
> That rule is supported by substantial authority in existing insurance law, and it is consistent with ERISA's purpose of protecting participants in employee benefit plans. *Id.* at 1394-1395.

Professor Baron explains the make whole doctrine as follows:

> Perhaps the most attractive of the intermediate doctrines is the "make whole" doctrine. Under this doctrine, subrogation is permitted only after the insured has been fully compensated or "made whole." This approach acknowledges the realistic nature of tort recoveries and rejects the blind assertion that subrogation is necessary in order to prevent the insured from realizing a "double recovery." . . . It was recently reported that the "make whole" doctrine now serves as the majority view, having been adopted in twenty-five jurisdictions.
>
> . . .
>
> Under the "make whole" doctrine, recent decisions have come to focus on the real or "net" compensation actually received by the insured. If the insured has been required to hire an attorney and incur court costs in order to effectuate a recovery against the tortfeasor, those attorney's fees and costs should be considered in determining whether the insured has been fully compensated. *Baron, id* at 250-251.

Since the Vonderharr's attorneys fees and costs were in excess of CHWT's claim, the make whole doctrine, which petitioner's counsel has agreed applies to the case, would defeat petitioner's claim in its entirety.

Finally, it is notable that an ERISA fiduciary can only pursue claims for true equitable relief against plan participants, as underscored in *Knudson*. The "make whole" rule is an equitable doctrine and is designed to prevent an insured from falling into a secondary position on collection of his damages. With the various methods of protecting itself available to it, an ERISA fiduciary should never be allowed priority to an injured victim's damages.

V. THIS COURT IN KNUDSON DID NOT CREATE A NEW LAW OF CONSTRUCTIVE TRUST APPLICABLE ONLY TO ERISA CASES

As this Court well knows, in *Knudson, supra*, the minority position of the Ninth Circuit barring assertion of contractual reimbursement provisions was affirmed. At the time of that decision, every other federal circuit that had ruled on the issue had allowed reimbursement. In *Knudson*, this Court conducted a precise analysis of the difference between equitable and legal restitution in order to determine the Congressional intent in drafting the ERISA civil enforcement scheme. The Court there held that assertion of contractual reimbursement schemes was not authorized under ERISA because such claims were necessarily legal in nature. At the conclusion of this discussion, and presumably by way of example, the *Knudson* Court noted:

> In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. (534 U.S. at 213).

This passage appears to be dicta in that it is not necessary to the Court's holding. It also clearly seems intended as a mere example to distinguish the legal form of restitution from the equitable form. There is absolutely nothing in the opinion to suggest that this language was intended to create a new form of constructive trust without the classic requirements of fraud, accident, mistake or other wrongful act.

CHWT contends that every circuit but the Ninth Circuit reaching the issue has allowed enforcement of ERISA reimbursement clauses through a constructive trust theory, but this is incorrect. CHWT claims (at page 9) that the Second, Third and Fourth Circuits have reached this conclusion but cites only cases not on point for that proposition, including two unpublished cases. One of these, *Local 109 Retirement Fund v. First Union National Bank*, 57 Fed.Appx. 139, 141 (4th Cir. 2003) actually directly supports respondent's position, as follows: "Moreover, Papageorge (the trustee) **does not point to any wrongdoing by the bank that would permit a court to impose a constructive trust**. Cf. *Restatement of Restitution*, § 160." (parenthetical and emphasis supplied). Therefore, in reality, it appears that only the Fifth and Seventh Circuits have allowed constructive trusts in ERISA reimbursement cases while the Sixth and Ninth Circuits (and the Fourth if one counts the unpublished *Local 109 Retirement Fund, supra*) have rejected them. Thus, the Ninth Circuit is not even in a minority position on this issue.

The Sixth Circuit has joined the Ninth Circuit in flatly rejecting such constructive trust cases in *QualChoice, Inc. v. Rowland*, 367 F.3d 638 (2004), and in *Community Health*

Plan of Ohio v. Mosser, 347 F.3d 619 (2003). In *QualChoice*, the court held:

> We conclude, however, that the source of the claim asserted by QualChoice is a contract to pay money, and that the procedural mechanisms for enforcing this right, as such relief would not have traditionally been awarded by a court of equity in a breach of contract. Historically, legal restitution was limited by the concept of formal title. Dobbs at 586. 367 F.3d at 648.

The *Qualchoice* court further held:

> Applying the Supreme Court's cases, we hold that a plan fiduciary's action to enforce a plan-reimbursement provision is a legal action, regardless of whether the plan participant or beneficiary recovered from another entity and possess that recovery in an identifiable fund. *Id.* at 650

Thus, the Sixth Circuit joins the Ninth Circuit (*Westaff v. Arce, supra*; *Honolulu Joint Apprenticeship Comm. of United Assn. Local Union No. 675 v. Foster*, 332 F.3d 1234 (2003), and the instant case, *Vonderharr*, 384 F.3d 667 (2004)) in rejecting any constructive trust argument being imposed as grounds to pursue contractual reimbursement under ERISA.

Nevertheless, at least two circuits that were allowing ERISA reimbursement before *Knudson* seized on the constructive trust language in *Knudson*, quoted above, to adopt a new rule that could be characterized as an "automatic constructive trust." CHWT has cited two of these cases in

its petition (at page 9, *Bombardier* and *Varco*). At its simplest level, this rule appears to be that in ERISA cases only, where an ERISA fiduciary with a contractual reimbursement provision locates a personal injury recovery and sues the person holding that recovery, constructive trust attaches as a matter of law. Somehow, a simple breach of contract claim metamorphoses into a constructive trust claim with none of the requisite elements of such a trust. This notion turns the entire law of constructive trust on its head. It is respectfully submitted that this cannot have been the intent of the Court in including the above passage in *Knudson*.

There is substantial authority for respondents' position in the law of constructive trust itself. There appears to be virtually no authority for the post-*Knudson* line of cases allowing the "automatic constructive trust." By way of example, California's law of constructive trust appears typical and is codified at Civil Code § 2224:

> One who gains a thing by **fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act** is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained . . . (emphasis supplied)

As the Ninth Circuit's decision in *Murphy v. Rowe Price Prime Reserve Fund, Inc.*, 8 F.3d 1420, 1422 (1993), notes, "[a] constructive trust is rarely imposed unless there is an allegation of wrongful behavior."

The requirement for some wrongful conduct to impose a constructive trust in an ERISA reimbursement case was first set forth in *FMC Medical Plan v. Owens*, 122 F.3d 1258

(9th Cir. 1997). There, the court relied on this Court's prior decision in requiring some wrongful act, as follows:

> Restitution is referred to in **Mertens as the return of ill-gotten assets or profits taken from a plan** Mertens, 508 U.S. at 260, 113 S. Ct. at 2071. Owens did not obtain FMC's funds by any fraud or wrong-doing. Owens obtained the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of this case. FMC's claim is for reimbursement of money that Owens rightfully received under the plans. Essentially, **FMC seeks a breach of contract for monetary relief**, albeit under its classification of "equitable reimbursement." Such monetary relief is **not available** under section 1132(a)(3)." *Id.* at 1261. (emphasis supplied).

More importantly, this Court has always referenced that there are requirements of constructive trust and never suggested that an automatic constructive trust would apply in ERISA reimbursement cases. Following *Mertens, supra*, this Court addressed the issue at length in *Harris Trust v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000), (also an ERISA case), with repeated references to wrongful conduct:

> Importantly, that a transferee was not "the original **wrongdoer**" does not insulate him from liability for restitution. *See also, e.g.*, Restatement of Restitution ch. 7, Introductory Note, p. 522 (1937); 1 Dobbs, *supra*, § 4.3(2), p. 597 ("The constructive trust is based on property, not wrongs"). It also bears emphasis that the

> common law of trusts **sets limits on restitution actions against defendants other than the principal "wrongdoer."** Only a **transferee of ill-gotten trust assets** may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in **breach of the trust**. Translated to the instant context, the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the **transaction unlawful**. Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction. *Lockheed Corp. v. Spink,* 517 U.S. 882, 888-889, 135 L. Ed. 2d 153, 116 S. Ct. 1783 (1996) n.3. (emphasis supplied)

The *Harris* decision is replete with references to wrongdoing, or knowledge of same. This is because the common law of trusts has always required such conduct, or mistake, or knowledge of such to impose a constructive trust. This is consistent with the leading treatises in the area of trusts, as cited by this Court. This Court has cited Bogert and the Restatement of Restitution in *Harris Trust*, *supra*. In Bogert, *The Law of Trusts and Trustees*, § 471, constructive trusts are defined, using the following language:

> When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of **unjust, unconscionable, or**

> **unlawful means**, it takes such interest from the defendant and vests it in the wronged party.
>
> . . .
>
> There are many synonyms for the constructive trust. It has frequently been called a trust "ex maleficio" or "ex delicto" because it **is based on the wrongful conduct of the trustee.**
>
> . . .
>
> In order to obtain a constructive trust the plaintiff **must identify specific property** as the res of the trust to which he is entitled. **Mere breach of contract does not entitle the complainant to a constructive trust**, nor does proof that defendant had been guilty of some wrongdoing and has assets that could be used to satisfy the complainant's claim. (emphasis supplied; footnotes omitted)

In Bogert, *Trusts*, 6th Ed., § 77, the author notes that constructive trusts, "are often based on disloyalty or other breach of trust by an express trustee, and are also created when . . . property is obtained or retained by other unconscionable conduct." Bogert, *id.*, § 77 also notes that such trusts "in a general way may be called 'fraud-rectifying' trusts, if the word 'fraud' is used in the sense of any kind of wrongdoing and not confined to an intentional false representation."

In the Introduction to *Restatement Trusts*, 3d, constructive trusts are defined generally as arising against a

person whose "acquisition or retention of the property is wrongful. . . ." In the Restatement, Restitution, Introductory Note, *Proceedings in Equity*, it is noted that, "the extraordinary jurisdiction of the Court of Chancery . . . was exercised in cases in which a fiduciary had failed to perform his duties . . . and in cases in which a person by fraud, mistake or duress had been deprived of property. . . . Part II of the Restatement, Restitution deals with constructive trust and analogous equitable remedies. §§ 163-171 thereof catalogues the most common categories of conduct justifying constructive trust. Each of these categories bears the words "mistake" or "wrong," or both, in the title.

This Court has also cited Dobbs, *Law of Remedies* in several of these cases. Dobbs does suggest that the requirement of wrongdoing is antiquated and no longer necessary. However, when examples of the modern law of constructive trusts are provided therein, they are replete with references to either wrongful conduct or mistake:

> Application of constructive trusts today. Restitution by way of constructive trust and similar remedies may be appropriate for **embezzlement** of money or for conversion of goods, for benefits transferred because of **fraud**, or **duress**, or **undue influence**, and for gains received by reason of **misuses** of position or information. Analogous relief has been given for such torts as **infringement** of copyright and the like. Even the **murderer for gain** may be a constructive trustee. But wrongdoing is not required. Property transferred by **mistake**, for example, may be recovered. . . . Dobbs, § 4.3(2) (emphasis supplied)

The likely explanation for this apparent contradiction is that in order for a plaintiff to have the necessary higher moral claim to the property, some form of wrongful conduct or mistake is normally required. Certainly, a mere allegation of breach of contract, especially when the contract is unlawful under ERISA, is insufficient as a matter of law.

Moreover, for either constructive trust or an equitable lien to attach, the same property has to be involved. Notably, Dobbs indicates that plaintiff cannot get a constructive trust or equitable lien on property without specifically tracing that same property to the defendant's possession:

> . . . this naturally implies that the plaintiff must identify specific property which can be regarded by equity as belonging to him. If the only evidence is that the defendant obtained the plaintiff's money, the plaintiff has established a debt claim that can be pursued by an ordinary judgment at law but has not established a basis for a constructive e trust or equitable lien on particular property. Dobbs, § 6.1(3).

Likewise, Bogert, *id.*, § 865, confirms that an equitable lien is not available unless the beneficiary can trace a trust fund to property in the hands of the defendant.

> This right to a lien does not exist except as the beneficiary can trace the trust fund in whole or in part into the hands of the defendant. The beneficiary has no right to a lien on property of the defendant which is unrelated to the trust property, and is not a product of it, except as the beneficiary obtains such a lien by docketing his judgment or by execution or attachment.

In the instant case, there are two separate pools of property. The first is the CHWT's payment to the medical providers of the Vonderharr's medical bills. As is typical, all such payments were made to the providers—not to the Vonderharrs. Therefore, the Vonderharrs never possessed any funds of CHWT that were paid for medical expenses. The second pool was the Vonderharr's settlement funds paid by the tortfeasor. These funds were never in CHWT's possession. Consequently, there is no way for CHWT to claim entitlement to a constructive trust to property that never belonged to it and was never in its possession. All that CHWT has is a mere contract claim against the Vonderharrs that is clearly prohibited by the exclusive ERISA civil enforcement scheme as interpreted in *Knudson* and *Davila, supra.* Such a claim, that is prohibited by federal law, is a legal nullity. It certainly does not give rise to a constructive trust nor to an equitable lien.

A simple example may help illustrate this. If CHWT had overpaid a medical provider by mistakenly sending $20,000 on a $2,000 claim, a constructive trust would lie against the provider because of the mistaken payment and the provider's knowledge of same. If the provider had tried to insulate the $18,000 overpayment by giving it to his bookkeeper, with an explanation of the facts, the constructive trust would apply to the bookkeeper's possession as well, because the bookkeeper was aware of the mistake. However, under no circumstances would a proper action for constructive trust lie against the provider's patient who did not receive the money paid by CHWT.

If the "automatic constructive trust" argument advanced by CHWT were to be accepted, it would create a constructive trust any time that a breach of contract occurred, leading to a

retention or loss of contract benefits. If that were to become the law, it would eliminate the *Pilot Life* doctrine, and bring back the law of first party bad faith to ERISA. Most states have statutory or common law by which a covenant of good faith and fair dealing is implied in every contract of insurance. Violation of that covenant is a breach of the contract of insurance, entitling the insured to sue for damages. This action for insurance bad faith was the precise cause of action eliminated in *Pilot Life, supra.* However, under the "automatic constructive trust" rule, these breaches of insurance contract would become constructive trust cases, allowing the insureds to recover all of their state damages claims barred by the *Pilot Life* line of cases. This is clearly not the law nor the intent of this Court. However, it ably demonstrates the double standard inherent in the relief which CHWT is seeking. It is the same double standard criticized by the seven judge dissent in *McDowell*, 385 F.3d 1168.

VI. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO DETERMINE WHETHER ERISA REIMBURSEMENT CLAIMS SHOULD BE DISMISSED ON THE MERITS OR FOR LACK OF SUBJECT MATTER JURISDICTION

It is clear from the ERISA statutes and this Court's opinions that contractual reimbursement actions are not authorized under the ERISA civil enforcement scheme. Given that 29 U.S.C. § 1132(e) provides the district courts with exclusive jurisdiction of civil actions under ERISA, the sweeping preemption provision in 29 U.S.C. § 1144, operating as an exception to the well pleaded complaint rule (*see Davila, supra*), it would appear that the proper method would be to accept jurisdiction and to dismiss reimbursement

actions for failure to state a claim, as the court did in this case. However, since the Court did it properly in the instant case, it would seem that another case where a lack of federal jurisdiction was found would be more appropriate. However, unless a finding of lack of federal jurisdiction leads to a substantive problem, like a denial of attorneys fees, this appears to a distinction without a difference. Certainly, if a plan participant were denied fees simply due to a finding of lack of federal jurisdiction, such a case would be ripe for hearing.

VII. THERE IS NO REASON WHATSOEVER TO DISTINGUISH ENTITLEMENT TO AN ATTORNEYS FEE AWARD BASED UPON WHETHER THE ERISA PARTICIPANT WAS A PLAINTIFF OR DEFENDANT

CHWT'S principal argument on the attorneys fee issue appears to focus on whether the prevailing ERISA participant was a plaintiff or defendant. This is completely specious. The parties were involved in a dispute concerning contractual ERISA documents. Given that either party was equally entitled to file an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, it should not matter who sued whom. In fact, if there were to be any differential in treatment of parties for fee purposes, one would assume that a prevailing ERISA defendant should be more entitled because they simply sought to be left alone. Any rule favoring plaintiffs in a fee award would simply tend to breed litigation.

CHWT's analysis completely overlooks the fact that there was an $80,000 fee award to a prevailing ERISA defendant in *Knudson*, in which case the Ninth Circuit's decision and position were affirmed. It also overlooks *Westaff*

v. Arce, supra, in which fees were awarded to a prevailing ERISA defendant in an ERISA reimbursement action and certiorari was denied at 537 U.S. 1111 (2003).

CHWT also reaches the amazing conclusion that it is likely to prevail on its state claims, which are alleged to be stronger because they carry punitive damages remedies. The state breach of contract claims are absolutely barred by this Court's most recent holding in *Davila, supra*, that, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." (*Id.* at 2495). However, it is interesting to observe the fanciful approach to litigation embodied by CHWT's position. Even though they are suing a brain damaged minor and her family for punitive damages under a discredited theory, and never survived the pleadings stage, they deem themselves to potentially be the "prevailing party."

VIII. THE SPECIAL CIRCUMSTANCES PRESUMPTION OF FEES TO A PREVAILING ERISA PARTICIPANT SERVES A LEGITIMATE PUBLIC PURPOSE

It is interesting to observe that CHWT accepts the *Hummell v. Rykoff*, 634 F.2d 446 (9th Cir. 1980), factors but rejects the "special circumstances" doctrine, extended by the Ninth Circuit to ERISA cases only four years later. Indeed, it appears that CHWT concedes that the Ninth Circuit's *Hummell* test is the majority rule. CHWT also disregards that at least one other circuit has adopted the "special circumstances" rule, affording a presumption of fees to a prevailing ERISA participant. *See Harris Trust & Sav. Bank v. Provident Life & Acc. Ins. Co.*, 57 F.3d 608 (7th Cir. 1995).

CHWT's position further ignores the fact that the "special circumstances" doctrine was developed in reliance upon opinions by this Court. In *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), the court held as follows:

> ERISA, like the Civil Rights Acts of 1871 and 1964, and the Labor-Management Reporting and Disclosure Act, is remedial legislation which should be liberally construed in favor of protecting participants in employee benefits plans. Section 502(g)(1), 29 U.S.C. § 1132(g)(1), authorizes the court to award attorney fees. This section "should be read broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under his plan, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968)).
>
> As in cases involving section 1988 awards, *see Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40, a district court considering a motion for attorney's fees under ERISA should apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts. *See* 29 U.S.C. § 1001(b); S. Rep. No. 93-127, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871. As a general rule, ERISA employee plaintiffs should be entitled to a reasonable attorney's fee "if they succeed on any

> significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 76 L. Ed. 2d at 50 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *See Lummi Indian Tribe*, 720 F.2d at 1125. *See also Central States Southeast v. Hitchings Trucking*, 492 F. Supp. 906, 909 (E.D. Mich. 1980). (*Id.* at 589).

The *Smith* court further quoted this Court on the importance of allowing fees to union members in litigation with their wealthy and powerful labor unions:

> As the Supreme Court said in *Hall v. Cole*, 412 U.S. 1, 13, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973), a case involving attorney's fees under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*:
>
> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.

Id. at 590.

The reason that this Court created the special circumstances presumption in Civil Rights Act cases was to encourage enforcement of the Act through private litigation. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-402 (1968). The law of ERISA needs the same presumption in order that plan participants can stand up to improper actions brought by their plans. Without recourse to such a presumption, most plan participants facing threat of improper contractual reimbursement actions would be steamrolled into submission.

Similarly, the reason that the Ninth Circuit extended the "special circumstances" doctrine to ERISA cases was to give credence to the remedial nature of the legislation, designed to protect employees and their beneficiaries. That presumption in favor of fees is particularly applicable in a case where a wealthy union plan attempts to subvert the whole intent of insurance by placing the entire loss on a grievously injured plan participant. When the plan does so in direct contravention of this Court's controlling decision in *Knudson, supra*, an award of attorneys fees serves an important purpose. Everyone in an ERISA plan benefits when a particular case result protects other plan members against future claims that erode their individual insurance coverage. When that case is published and this Court denies certiorari, that same benefit extends to ERISA plan participants across the country.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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